Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Part 123

(T.D. 83-118)

Foreign Locomotives and Railroad Equipment

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: The rule amends the Customs Regulations to provide that:

1. Foreign locomotives or other foreign railroad equipment in use on a continuous route crossing one international boundary into the United States, shall be admitted without formal entry or the payment of duty to proceed to the end of the run and depart for another foreign country;

2. Foreign railroad equipment other than locomotives may be used in such trains or for such local traffic as is reasonably incidental to its economical and prompt departure for a foreign country; and

3. Empty foreign railroad equipment shall be admitted to the United States without formal entry and payment of duty if the passengers or goods to be loaded are to be transported to or through any foreign country.

A conforming amendment to the regulations relating to foreign-based truck trailers also is made.

This action is taken to remove a serious hindrance to strictly international traffic, while retaining the prohibition against diversions of foreign locomotives and railroad equipment to unpermitted point-to-point local traffic.

The purpose of the amendments is to allow a three country movement (Canada-U.S.-Mexico, or reverse) of foreign locomotives and railroad equipment in international traffic, and thus not subject those locomotives or that equipment to formal entry or duty.

EFFECTIVE DATE: June 24, 1983.

FOR FURTHER INFORMATION CONTACT: John Mathis, Carriers, Drawback and Bonds Division, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229 (202–566–5706).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Section 322(a) of the Tariff Act of 1930, as amended (19 U.S.C. 1322(a)), provides that vehicles and other instruments of international traffic, of any class specified by the Secretary of the Treasury, shall be granted "the customary exceptions from the applications of the customs laws" to the extent of, and subject to, the terms and conditions prescribed in the regulations or instructions of the Secretary.

Section 123.12(a), Customs Regulations (19 CFR 123.12(a)), presently provides that foreign locomotives or other foreign railroad equipment in use on a continuous route crossing an international boundary into the United States, shall be admitted without formal entry or the payment of duty to proceed to the end of the run and return to the country in which the run began in certain specified situations. Section 123.12(a)(2) further provides that foreign railroad equipment other than locomotives may be used on the outward (*i.e.,* return) trip only in connection with trains crossing the boundary, or for such local traffic as is reasonably incidental to the economical and prompt return of the equipment to the country from which it entered the United States.

In addition, section 123.12(b), Customs Regulations (19 CFR 123.12(b)), now provides that empty foreign railroad equipment shall be admitted to the United States without formal entry and payment of duty only if the passengers or goods to be loaded are to be transported directly to or through the country from which the equipment entered the United States.

However, it is clear that the underlying purpose of sections 123.12 (a) and (b), and their antecedents, was to prohibit wholesale diversions to unpermitted point-to-point local traffic of foreign locomotives and railroad equipment moving through the United States in international traffic, but not to hinder any strictly international traffic.

Accordingly, to give full effect to a 1978 ruling in which Customs held that a three country movement (Canada-U.S.-Mexico) is international traffic, and to eliminate the dichotomy between the strict language of the regulations and current administrative practice, a notice of proposed rulemaking to amend section 123.12 was published in the Federal Register on August 27, 1982 (47 FR 37924).

The proposed amendment to section 123.12(a) provided that foreign locomotives or other foreign railroad equipment in use on a continuous route crossing one international boundary into the United States (*e.g.,* Canada) shall be admitted without formal entry or the payment of duty to proceed to the end of the run and depart

for another foreign country (*e.g.*, Mexico). Section 123.12(a)(2) also was to be amended to provide that foreign railroad equipment other than locomotives may be used on an outward trip in such trains or for such local traffic as is reasonably incidental to its economical and prompt departure for a (any) foreign country. The "outward" trip, then, would no longer refer exclusively to a return trip to the country in which the railroad equipment began its run. The equipment might return, or it might proceed to another foreign country.

The proposed amendment to section 123.12(b) provided that empty foreign railroad equipment shall be admitted to the United States without formal entry and payment of duty if the passengers or goods to be loaded are to be transported directly to or through any foreign country.

A conforming amendment also was to be made to section 123.14(c)(2), Customs Regulations (19 CFR 123.14(c)(2)), to provide that a foreign-based truck trailer may carry merchandise between points in the United States on its departure for a foreign country under the same conditions as are prescribed for "other foreign railroad equipment" in proposed section 123.12(a)(2).

No comments were received in response to the notice of proposed rulemaking. Therefore, after a review of the matter Customs has determined to adopt the proposal as described in that notice.

E.O. 12291 and Regulatory Flexibility Act

It has been determined that the amendment in this document are not a "major rule" within the criteria provided in section 1(b) of E.O. 12291, and therefore no regulatory impact analysis is required.

Pursuant to the provisions of section 605(b) of the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601 *et seq.*), it is hereby certified that the regulations set forth in this document will not have a significant economic impact on a substantial number of small entities. Accordingly, these regulations are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

Drafting Information

The principal author of this document was Todd J. Schneider, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

List of Subjects in 19 CFR Part 123

Canada, Customs duties and inspection, Exports, Freight, Imports, Mexico, Motor carriers, Railroads.

AMENDMENTS TO THE REGULATIONS

Part 123, Customs Regulations (19 CFR Part 123), is amended as set forth below.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: May 6, 1983.
JOHN M. WALKER, JR.,
Assistant Secretary of the Treasury.

[Published in the Federal Register, May 25, 1983 (48 FR 23384)]

PART 123—CUSTOMS RELATIONS WITH CANADA AND MEXICO

1. Section 123.12(a) introductory text is revised to read as follows:

§ 123.12 Entry of foreign locomotives and equipment in international traffic.

(a) *Use on a continuous route.* Foreign locomotives or other foreign railroad equipment in use on a continuous route crossing the boundary into the United States shall be admitted without formal entry or the payment of duty to proceed to the end of the run and depart for a foreign country, in accordance with the following:

* * * * * * *

2. Section 123.12(a)(2) is revised to read as follows:

§ 123.12 Entry of foreign locomotives and equipment in international traffic.

(a) *Use on a continuous route.* * * *

(2) *On outward trip.* Foreign locomotives may be used on the outward trip only in connection with through trains crossing the boundary, including switching to make up such trains. Other foreign railroad equipment may be used in such trains or for such local traffic as is reasonably incidental to its economical and prompt departure for a foreign country.

* * * * * * *

3. Section 123.12(b) is revised to read as follows:

§ 123.12 Entry of foreign locomotives and equipment in international traffic.

* * * * * * *

(b) *Admission of empty equipment.* Empty foreign railroad equipment shall be admitted to the United States without formal entry and payment of duty only if the passengers or goods to be loaded are to be transported directly to or through a foreign country.

* * * * * * *

4. Section 123.14(c)(2) is revised to read as follows:

§ 123.14 Entry of foreign based trucks, buses, and taxicabs in international traffic.

* * * * * * *

(c) *Use in local traffic.* * * *

(2) A foreign-based truck trailer may carry merchandise between points in the United States on its departure for a foreign country under the same conditions as are prescribed for "other foreign railroad equipment" in § 123.12(a)(2).

(R.S. 251, as amended, sec. 14, 67 Stat. 516, as amended, sec. 624, 46 Stat. 759, 77A Stat. 14; and Gen. Hdnte. 11, Tariff Schedules of the U.S. (19 U.S.C. 66, 1202, 1322(a), 1624))

(T.D. 83-119)

Bonds

Approval and discontinuance of consolidated aircraft bonds (air carrier blanket bonds), Customs Form 7605

The following consolidated aircraft bonds have been approved or discontinued as shown below. The symbol "D" indicates that the bond previously outstanding has been discontinued on the month, day, and year represented by the figures which follow. "PB" refers to a previous bond, dated as represented by the figures in parentheses immediately following, which has been discontinued. If the previous bond was in the name of a different company or if the surety was different, the information is shown in a footnote at the end of the list.

Dated: May 18, 1983.

Name of principal and surety	Date of term commences	Date of approval	Filed with district director/area director/amount
People Express Airlines, Inc., North Terminal, Newark International Airport, Newark, NJ; American Motorists Ins. Co. The foregoing principal has been designated as a carrier of bonded merchandise.	May 6, 1983	May 9, 1983	New York Seaport $100,000
South Pacific Island Airways, Inc., P.O. Box 31263, Honolulu, HI; Washington International Ins. Co. The foregoing principal has been designated as a carrier of bonded merchandise.	Apr. 15, 1983	Apr. 18, 1983	Honolulu, HI $100,000

BON-3-01

MARILYN G. MORRISON,
Director,
Carriers, Drawback and Bonds Division.

(T.D. 83-120)

Reimbursable Services—Excess Cost of Preclearance Operations

DEPARTMENT OF THE TREASURY
Office of the Commissioner of Customs,
Washington, D.C., May 19, 1983.

Notice is hereby given that pursuant to Section 24.18(d), Customs Regulations (19 CFR 24,18(d)), the biweekly reimbursable excess costs for each preclearance installation are determined to be as set forth below and will be effective with the pay period beginning May 29, 1983.

Installation	Biweekly excess cost
Montreal, Canada	$20,989
Toronto, Canada	38,671
Kindley Field, Bermuda	7,667
Nassau, Bahama Islands	14,069
Vancouver, Canada	14,163
Winnipeg, Canada	2,556
Freeport, Bahama Islands	8,955
Calgary, Canada	9,436
Edmonton, Canada	3,440

WILLIAM H. RUSSELL,
Comptroller.

[Published in the Federal Register, May 25, 1983 (48 FR 23513)]

(T.D. 83-121)

Fish—Tariff-Rate Quota

Tariff-rate quota for the calendar year 1983, on fish dutiable under item 110.50, Tariff Schedules of the United States (TSUS)

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Announcement of the quota quantity on certain fish for calendar year 1983.

SUMMARY: The tariff-rate quota for fish pursuant to item 110.50, TSUS, for the 1983 calendar year is 49,488,851 pounds.

EFFECTIVE DATES: The 1983 tariff-rate quota is applicable to fish described in item 110.50, TSUS, which are entered, or withdrawn from warehouse, for consumption during calendar year 1983.

FOR FURTHER INFORMATION CONTACT: William D. Slyne, Chief, Special Operations Branch, Duty Assessment Division, U.S. Customs Service, Washington, D.C. 20229 (202-566-2957).

SUPPLEMENTARY INFORMATION: This tariff-rate quota for fish is equal to 15 percent of the average aggregate apparent annual consumption in the United States of fish, fresh, chilled or frozen, fillets, steaks, and sticks, of cod, cusk, haddock, hake, pollock, and rosefish, for the 3 preceding years, as provided for in headnote 1, part 3A, Schedule 1, and item 110.50 TSUS.

It has been determined that the average aggregate consumption for calendar year 1980 through 1982 was 329,925,674 pounds. Therefore, the quota quantity of fish, item 110.50, TSUS, for calendar year 1983 is 49,488,851 pounds.

(QUO-2-CO:T:D:SO)

Dated: May 20, 1983.

EDWARD F. KWAS,
Acting Commissioner of Customs.

[Published in the Federal Register, May 25, 1983 (48 FR 23513)]

(T.D. 83-122)

19 CFR Part 133

RECORDATION OF TRADE NAME: CHAMS DE BARON LTD.

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of Recordation.

SUMMARY: On March 10, 1983, a notice of application for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "CHAMS DE BARON LTD." was published in the Federal Register (48 FR 10188-10189). The notice advised that before final action on the application, consideration would be given to relevant data, views, or arguments submitted in opposition to the recordation and received not later than May 10, 1983. No responses were received in opposition to the notice.

Accordingly, as provided in section 133.14, Customs Regulations (19 CFR 133.14), the name "CHAMS DE BARON LTD." is recorded as the trade name used by Chams De Baron Ltd., a corporation organized under the laws of the State of New York, located at 1350

Broadway, New York, New York 10018. The trade name is used in connection with the following merchandise which is manufactured in Taiwan, Hong Kong, South Korea, and the Philippines: men's and women's wearing apparel, including shirts, tops, sweaters, jackets and pants.

DATE: May 25, 1983.

FOR FURTHER INFORMATION CONTACT: Harriet Lane, Entry, Licensing and Restricted Merchandise Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202–566–5765).

Dated: May 20, 1983.

A. PIAZZA,
Acting Director,
Entry Procedures and Penalties Division.

[Published in the Federal Register, May 25, 1983 (48 FR 23513)]

(T.D. 83–123)

Drawback Contract—Relative Values (19 U.S.C. 1313(a))

BACKGROUND

The drawback law (19 U.S.C. 1313(a)) requires that "drawback shall be distributed to the several products in accordance with their relative values at the time of separation" when two or more products necessarily are produced concurrently in the same operation. The purpose is to prevent an overpayment of drawback when the claimant elects to keep the valuable product in this country and export the lesser valued product(s) for drawback. Thus, values for all by-products must be established at the time of separation during the manufacturing process. Drawback is allowed upon the exportation of by-products but is not allowed for waste.

An example of a by-product situation is the process of crushing linseed which produces concurrently in the same operation two different articles of commerce, linseed oil and linseed cake. A non-by-product situation would be the election by a manufacturer to use one-half of a shipment of aluminum to make gutters and the other half to make kitchen utensils.

The purpose of this document is to provide a general drawback contract to cover situations involving relative values and by-products for direct identification drawback.

REQUISITES FOR GENERAL CONTRACT

Any person who can comply with the conditions of the contract which follows may, with the agreement of the Regional Commis-

sioner, adhere to it by notifying him in writing of its intention to do so and providing him with the following information:

1. Name and address of the manufacturer (or producer);
2. List of imported merchandise or drawback products used in manufacturing;
3. List of products and by-products manufactured in the same operation;
4. Factories which will operate under the contract; and,
5. If the manufacturer is a corporation, the names of officers or persons with power of attorney who will sign drawback documents on behalf of adherent.

Dated: May 23, 1983.

MARILYN G. MORRISON,
Director,
Carriers, Drawback and Bonds Division.

GENERAL CONTRACT UNDER 19 U.S.C. 1313(a)

For By-Product Situations

Imported Merchandise or Drawback Products Used

Imported merchandise (or drawback products) is used in the manufacture of the exported articles upon which drawback claims will be based.

Exported Articles on Which Drawback Will Be Claimed

Exported articles on which drawback will be claimed will be manufactured in the United States using imported merchandise or drawback products.

Process of Manufacture and By-Products

The imported merchandise or drawback products will be used to manufacture new and different articles having distinctive names, characters, and/or uses.

The manufacturing process under this contract produces in the same operation the principal product and one or more by-products.

Relative Values

The records maintained to support drawback shall include the market value of each product or by-product at the time it is first separated in the manufacturing process.

Loss or Gain

Some manufacturing processes result in an intangible loss or gain in net weight or measurement of the imported merchandise caused by atmospheric conditions, chemical reactions, or other factors. If applicable, we agree to keep records showing the loss or gain.

Stock In Process

Some manufacturing processes are stopped with imported materials in the apparatus at the time of the stoppage, and some processes result in residue materials which are reintroduced in the manufacturing process. These materials, called stock in process, reduce the quantity of imported merchandise used to manufacture the products. If applicable, records shall be maintained to show the quantity of stock in process.

Waste

Drawback is not payable on any waste from the manufacturing process. We will keep records to show the value, the quantity, and the disposition of any waste that results from the manufacturing process.

Procedures and Records Maintained

We shall maintain records to establish:

1. That the exported articles on which drawback is claimed were manufactured or produced with the use of the imported merchandise or drawback products;

2. The quantity of the imported merchandise or drawback products used in manufacturing the exported articles; and,

3. That the completed articles were exported within five years after importation of the imported merchandise.

Inventory Procedures

Our inventory procedures will show how we will satisfy the legal requirements discussed under the heading *Procedures and Records Maintained.* We understand that if our records do not show that we satisfy those requirements, drawback cannot be paid.

Basis of Claim for Drawback

The claims for drawback will be based on the quantity of imported merchandise or drawback products *Used In* the manufacture of the exported products with the market value of each product and by-product determined at the time it is first separated in the manufacturing process.

When valuable waste is recovered in the manufacturing process, the claims for drawback will be based on the quantity of the merchandise used to produce the products for export, less the amount of such material which the value of the waste would replace.

Agreements

We specifically agree that we will:

1. Comply fully with the terms of this statement when claiming drawback;

2. Open our factory and records for examination at all reasonable hours by authorized Government officers;

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3. Keep our drawback related records and supporting data for at least 3 years from the date of payment of any drawback claim predicated in whole or in part upon this statement;

4. Keep this statement current by reporting promptly to the regional commissioner who liquidates the claims any changes in the number or location of our offices or factories, the corporate name, or the corporate organization by succession or reincorporation;

5. Keep a copy of this statement on file for ready reference by employees and require officials and employees concerned to familiarize themselves with the provisions of this statement; and,

6. Issue instructions to ensure proper compliance with title 19, United States Code, section 1313(a) and (i), part 22 of the Customs Regulations, and this statement.

(T.D. 83-124)

Synopses of Drawback Decisions

The following are synopses of drawback rates issued October 5, 1977, to December 17, 1982, inclusive, pursuant to sections 22.1 through 22.5, inclusive, Customs Regulations; and an approval under section 22.6, Customs Regulations.

In the synopses below are listed for each drawback rate approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the statement was signed, the basis for determining payment, the Regional Commissioner to whom the rate was forwarded or issued by, and the date on which it was forwarded or issued.

Dated: May 20, 1983.

File: 215898

GEORGE C. STEUART
(For Marilyn G. Morrison,
Director, Carriers, Drawback and Bonds Division.)

(A) Company: Burlington Industries, Inc.

Articles: Greige or dyed wool piece goods; greige or dyed wool worsted piece goods; blended greige or dyed wool and synthetic piece goods; blended greige or dyed wool worsted and synthetic piece goods.

Merchandise: Undyed and dyed wool yarn; undyed and dyed wool worsted yarn; undyed and dyed blended wool and synthetic yarn; undyed and dyed blended wool worsted and synthetic yarn.

Factories: Raeford, Oxford, Forest City, Franklinton, and Fayetteville, NC; Clarksville and Halifax, VA; Johnson City, TN; Bishopville, SC; Shannon, GA.

Statement signed: July 26, 1982.
Basis of claim: Appearing in.
Rate forwarded to RC, Boston (Baltimore Liquidation) and New York: November 9, 1982.

(B) Company: Burlington Industries, Inc.
Articles: Grease wool sorted and/or graded; wool matchings; scoured, carded, combed, wool top; cut top; noils; doffer/blousettes; cardfly; burr; axiflo; and clean reworkable.
Merchandise: Wool in the grease or washed.
Factory: Clarksville, VA.
Statement signed: September 14, 1982.
Basis of claim: Used in, with distribution to the products obtained, in accordance with their relative value at the time of separation.
Rate forwarded to RC, Boston (Baltimore Liquidation): December 3, 1982.
Revokes: T.D.'s 73-88-EE, 73-88-DD, and 76-159-P.

(C) Company: Cargill Citro America, Inc.
Articles: Orange juice from concentrate, frozen concentrated orange juice, and bulk concentrated orange juice.
Merchandise: Concentrated orange juice for manufacturing.
Factories: Agents operating under T.D. 81-181 and T.D.'s 55207(1) and 55027(2).
Statement signed: September 11, 1981.
Basis of claim: Used in.
Rate forwarded to RC, Miami: December 17, 1982.

(D) Company: Caulkins Indiantown Citrus Co.
Articles: Frozen concentrated orange juice and orange juice drink base.
Merchandise: Concentrated orange juice for manufacturing.
Factory: Indiantown, FL.
Statement signed: September 9, 1982.
Basis of claim: Used in.
Rate forwarded to RC, Miama: November 19, 1982.
Revokes: T.D. 81-78-D.

(E) Company: Custom Extrusion, Inc.
Articles: Fluorescent light fixture diffusers.
Merchandise: Clear acrylic polymer.
Factory: Sheffield, MA.
Statement signed: June 8, 1982.
Basis of claim: Used in.
Rate issued by RC in accordance with section 22.4(o)(2): New York, July 22, 1982.
Revokes: T.D. 69-240-K.

(F) Company: Daelco, Inc.

Articles: Lead oxide.
Merchandise: Corroding lead.
Factories: City of Commerce, CA; Beaverton, OR.
Statement signed: July 16, 1982.
Basis of claim: Used in.
Rate forwarded to RC, Los Angeles: November 12, 1982.

(G) Company: Florida Citrus Groves Corp.
Articles: Orange juice from concentrate, frozen concentrated orange juice, bulk concentrated orange juice, grapefruit juice from concentrate, frozen concentrated grapefruit juice, and blended orange and grapefruit juice.
Merchandise: Concentrated orange juice for manufacturing and concentrated grapefruit juice for manufacturing.
Factory: Altamonte Springs, FL.
Statement signed: July 9, 1981.
Basis of claim: Used in.
Rate forwarded to RC, Miami, November 22, 1982.

(H) Company: General Electric Co.
Articles: Polyphenylene oxide, in powder form.
Merchandise: Methanol; phenol.
Factories: Selkirk, NY; Pittsfield, MA.
Statement signed: September 16, 1977.
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation.
Rate forwarded to RC, New York: October 5, 1977.

(I) Company: B. F. Goodrich Co.
Articles: Polymer chemicals and elastomers.
Merchandise: Diisobutylene.
Factories: Akron and Avon Lake, OH; Henry, IL; Louisville, KY; Port Neches, TX.
Statement signed: July 12, 1982.
Basis of claim: Appearing in.
Rate forwarded to RC, Boston (Baltimore Liquidation): November 26, 1982.

(J) Company: Gulf States Manufacturers, Inc.
Articles: Structural steel components, sheet metal flashing, formed sheet metal panels for exterior walls and accessories.
Merchandise: Steel sheet and plate, bolts, nuts, and washers.
Factory: Starkville, MS.
Statement signed: July 12, 1982.
Basis of claim: Appearing in.
Rate forwarded to RC, New Orleans: December 3, 1982.

(K) Company: H. P. Hood Inc.

Articles: Orange juice from concentrate, frozen concentrated orange juice, bulk concentrated orange juice.
Merchandise: Concentrated orange juice for manufacturing.
Factory: Dunedin, FL.
Statement signed: January 28, 1982.
Basis of claim: Used in.
Rate forwarded to RC, Miami: November 19, 1982.
Revokes: T.D. 73-324-N.

(L) Company: Houdaille Industries, Inc., Penberthy Div.
Articles: Liquid level gages and sight flow indicators.
Merchandise: Borosilicate reflex and transparent gage glass and borosilicate laminated glass lenses.
Factory: Prophetstown, IL.
Statement signed: June 25, 1982.
Basis of claim: Appearing in.
Rate forwarded to RC, Chicago: December 13, 1982.

(M) Company: Keebler Co.
Articles: Cookies, crackers, ice cream cones, crumb base pie crust, pretzels, toaster pastries, cereal, and other snack foods.
Merchandise: Refined coconut oil manufactured with the use of imported crude coconut oil and peanut oil.
Factories: Various factories as listed in manufacturer's statement.
Statement signed: September 21, 1982.
Basis of claim: Appearing in.
Rate forwarded to RCs, Los Angeles (San Francisco Liquidation) and Chicago: December 17, 1982.
Revokes: T.D. 68-248-E.

(N) Company: Lawrence Aviation Industries, Inc.
Articles: Aviation grade titanium sheet.
Merchandise: Titanium sponge, titanium slab and titanium sheet bar.
Factory: Port Jefferson Station, NY
Statement signed: November 2, 1982.
Basis of claim: Appearing in.
Rate forwarded to RC, New York: December 13, 1982.

(O) Company: Litton Business Systems, Inc., Fitchburg Paper Co. Div.
Articles: Paper.
Merchandise: Laminating grade rutile titanium dioxide.
Factory: Fitchburg, MA.
Statement signed: November 9, 1982.
Basis of claim: Used in.
Rate forwarded to RC, Boston: December 2, 1982.

(P) Company: Manning Fabrics Inc., AKA The Manning Corp.

Articles: Combined upper materials for footwear, 100 percent cotton.
Merchandise: Greige goods (cotton duck, drill, and sateen).
Factory: St. Pauls, NC.
Statement signed: November 24, 1982.
Basis of claim: Used in.
Rate forwarded to RC, Miami: December 7, 1982.
Revokes: T.D. 78–94–R.

(Q) Company: Mauna Loa Macadamia Nut Corp.
Articles: Roasted and salted macadamia nuts; macadamia nut confections, cookies, and cakes; and roasted unsalted macadamia nuts.
Merchandise: Raw macadamia nuts.
Factory: Puna District, County of Hawaii, Hawaii.
Statement signed: November 24, 1982.
Basis of claim: Used in.
Rate forwarded to RCs, Los Angeles (San Francisco Liquidation) and New Orleans: December 17, 1982.

(R) Company: Nibco Inc.
Articles: Various copper fittings, including but not limited to connectors, bushings, couplings, etc.
Merchandise: Copper ingots, bars, and sheets.
Factories: Various factories as listed in manufacturer's statement.
Statement signed: December 1, 1982.
Basis of claim: Appearing in.
Rate forwarded to RC, Chicago: December 17, 1982.

(S) Company: Pellerin Milnor Corp.
Articles: Milnor commercial laundry washer extractors.
Merchandise: Washer extractor parts.
Factory: Kenner, LA.
Statement signed: August 2, 1982.
Basis of claim: Appearing in.
Rate forwarded to RC, New Orleans: November 12, 1982.
Revokes: T.D. 77–192–U.

(T) Company: Pepsi-Cola & National Brand Beverages Ltd.
Articles: Canned and bottled carbonated and non-carbonated beverages.
Merchandise: Hard and liquid refined sugar, and liquid refined invert sugar.
Factories: Paterson and Pennsauken, NJ.
Statement signed: July 1, 1982.
Basis of claim: Used in.
Rate issued by RC in accordance with section 22.4(o)(2): New York, August 12, 1982.
Revokes: T.D. 79–230–P.

(U) Company: Polychrome Corp.
Articles: Presensitized lithographic printing plates.
Merchandise: Aluminum litho sheet/foil in coil.
Factory: Yonkers, NY.
Statement signed: August 31, 1982.
Basis of claim: Appearing in.
Rate forwarded to RC, New York: November 19, 1982.

(V) Company: Raymond International Builders, Inc.
Articles: Corrugated piling shells and other steel products for use in construction work.
Merchandise: Steel.
Factory: Baltimore, MD.
Statement signed: November 17, 1980.
Basis of claim: Appearing in.
Rate issued by RC in accordance with section 22.4(o)(2): New York, March 31, 1982.
Revokes: T.D. 56255–G as amended 72–282–J and 76–300–S to cover a change in name of company from Raymond International Inc., to Raymond International Builders, Inc.

(W) Company: Rheem Manufacturing Co.
Articles: Various refrigeration systems; air-conditioners; heat pumps; and associated equipment.
Merchandise: Aluminum sheet, foil; aluminum ingot, unalloyed; copper tubing; copper cathodes; polyethylene resins.
Factories: Various factories as listed in manufacturer's statement.
Statement signed: July 26, 1982.
Basis of claim: Appearing in.
Rate forwarded to RC, New York: November 30, 1982.

(X) Company: The Seven-Up Co.
Articles: Processed lemon oil No. 3280.
Merchandise: Lemon oil.
Factory: St. Louis, MO.
Statement signed: August 31, 1982.
Basis of claim: Appearing in.
Rate forwarded to RC, Chicago: November 24, 1982.

(Y) Company: Southern Fruit Distributors, Inc.
Articles: Orange juice from concentrate, frozen concentrated orange juice, and bulk concentrated orange juice.
Merchandise: Concentrated orange juice for manufacturing.
Factory: Orlando, FL.
Statement signed: August 3, 1981.
Basis of claim: Used in.
Rate forwarded to RC, Miami: December 15, 1982.
Revokes: T.D. 80–245–W.

(Z) Company: Texture-Tex, Inc.
Articles: Plied nylon yarn.
Merchandise: Single ply filament nylon yarn.
Factories: Valdosta and Dalton, GA.
Statement signed: July 26, 1982.
Basis of claim: Used in, less valuable waste.
Rate forwarded to RC, Miami: December 7, 1982.

Approval Under Section 22.6, Customs Regulations

(1) Company: Phillips Petroleum Co.
Articles: Petroleum products.
Merchandise: Crude petroleum or petroleum derivatives.
Statement signed: April 28, 1982.
Basis of claim: As provided in the drawback contract contained in section 22.6(g–1) of the Customs Regulations.
Factories: Borger, Houston, Sweeny and Orange, TX; Kansas City, KS; Woods Cross, UT.
Rate forwarded to RC, Chicago: July 30, 1982.
Revokes: T.D. 81–91–T.

U.S. Customs Service

General Notice

Receipt of Domestic Interested Party Petition Concerning Tariff Classification of Polypropylene Ropes; Correction

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of receipt of domestic interested party petition; correction.

SUMMARY: This document corrects an error in the notice of receipt of a domestic interested party requesting the reclassification of certain imported polypropylene ropes which was published in the Federal Register on April 29, 1983 (48 FR 19510).

In the notice, the words "strips and" were inadvertently omitted in several places.

In order to avoid any possible confusion as to the extent of the subject petition, it has been determined advisable to clearly provide that the petition is concerned with the classification of any cordage made from strips over one inch in width. It is not limited solely to plexiform filaments. Accordingly, this document amends the notice by:

1. Revising the beginning of the second sentence of the first paragraph under the heading "Background" to read as follows: "The petitioner contends that certain imported polypropylene ropes made from strips over one inch in width and 'plexiform filaments' derived from strips over one inch in width, which are currently classified * * *"

2. Adding the words "strips and" before the words "plexiform filaments" in the following paragraphs under the heading "Background".

a. The last sentence in the second paragraph.

b. In both the first and second sentences of the fifth paragraph.

c. In all three sentences of the seventh paragraph.

d. The first sentence in the eighth paragraph.

3. Extending the comment period due to the corrections to provide the public with an additional 30 days in which to submit written comments to Customs regarding the document. Thus, the new deadline for submitting written comments is July 27, 1983.

EFFECTIVE DATE: May 25, 1983.

405-948 0 - 83 - 3

FOR FURTHER INFORMATION CONTACT: Phil Robins, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (566–8181).

Dated: May 20, 1983.

B. JAMES FRITZ,
Director, Regulations Control
and Disclosure Law Division.

[Published in the Federal Register, May 25, 1983 (48 FR 23513)]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
Morgan Ford
Frederick Landis
James L. Watson
Bernard Newman
Nils A. Boe
Gregory W. Carman

Senior Judges

Herbert N. Maletz

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 83-47)

LOIS JEANS & JACKETS, U.S.A., INC., now known as LOIS SPORTSWEAR, U.S.A., INC., PLANTIFF *v.* UNITED STATES, DEFENDANT

Court Nos. 83-4-00620, 82-12-01715

ORDER

Dated May 12, 1983

NEWMAN, *Judge:* This matter came before the Court on plantiff's application for an order to show cause, dated and entered on April 28, 1983, after conferring with counsel for the parties. Pursuant to that order, defendant was directed to appear at a hearing on May 9, 1983, to show cause why an order should not be entered, in conformance with rule 65 of the Rules of the Court of International Trade, enjoining defendant during the pendency of this action from enforcing notices of redelivery issued by the United States Customs Service, dated March 1, 1983 and predicated upon a ruling of the Customs Service issued June 30, 1982. The Customs Service ruling in question had determined that the stitching design on the back pockets of certain jeans imported by plaintiff infringes upon the registered and recorded trademark (a "Double Arcuate" design) owned by Levi Strauss & Co., a domestic manufacturer of jeans; and therefore, plaintiff's jeans would be denied entry under said ruling.

This Court, having heard and considered the oral testimony, affidavits, briefs and arguments submitted by the parties in support of, and in opposition to, plantiff's application for a preliminary injunction, and upon all other papers and proceedings herein, finds and concludes as follows:

1. That the Court of International Trade lacks jurisdiction of the action in Court No. 82-12-01715;

2. That the Court of International Trade has jurisdiction over the action in Court No. 83-4-00620 pursuant to 28 U.S.C. § 1581(a);

3. That plaintiff has raised questions going to the merits of its substantive trademark claim so serious, substantial and difficult as to make the issue of trademark infringement fair ground for litigation;

4. That the issue of trademark infringement before this Court is also *sub judice* in a declaratory judgment action heretofore filed by plaintiff against Levi Strauss & Co. in the United States District Court for the Southern District of New York (82 Civ. 8326);

5. That the ruling issued by the United States Customs Service on June 30, 1982, upon which the notices of redelivery dated March 1, 1983 were based, was issued without giving plaintiff the notices specified by the Customs Regulations (19 CFR §§ 177.10(c)(2) and 177.9(d)(1)); and plaintiff therefore has established a likelihood of success on the merits respecting its procedural claim that the June 30, 1982 ruling and the redelivery notices are invalid;

6. That plaintiff has further established the likelihood of success on the merits of its alternative claim that all of the jeans which have been ordered redelivered by Customs were "on order" before December 18, 1982, effective date of the June 30, 1982 ruling, by virtue of an extension of time granted by Customs for implementation of its ruling;

7. That enforcement of the June 30, 1982 ruling by the United States Customs Service prior to a resolution of the merits will result in immediate and irreparable injury, loss, or damage to the plaintiff;

8. That the injuries suffered by plaintiff as a result of the Customs ruling and notices of redelivery have been, and absent temporary injunctive relief would continue to be, among others:

Plaintiff's loss of its substantial expenditures for promotional efforts, marketing and advertising in reliance upon a prior favorable ruling by Customs on the infringement issue dated June 4, 1981, which ruling was reversed on June 30, 1982 by the Customs Service without notice to plaintiff; default by plaintiff in filling customer's orders and fulfilling other commitments previously entered into; past and potential lost sales; lost credibility with plaintiff's customers; adverse effect upon plaintiff's reputation as a reliable supplier; and additionally, the cost of altering plaintiff's production methods.

9. That while there is a viable threat of immediate irreparable injury to plaintiff's business if the June 30, 1982 ruling were implemented by Customs, a preliminary injunction restraining such implementation will not cause significant harm or injury to defendent; and that balancing the hardships placed upon the parties decidedly tips the scale in favor of plaintiff;

10. That while defendant's statutory obligations respecting trademark infringement under 15 U.S.C. § 1124 and 19 U.S.C. § 1526 serve the public interest, there is a likelihood that plaintiff can establish the invalidity of the June 30, 1982 ruling, and hence, plaintiff's jeans should not be denied entry based upon Customs's ruling.

Now, therefore, in accordance with the foregoing findings and conclusions, it is

ORDERED ADJUDGED AND DECREED:

1. That defendant's cross-motion to dismiss the prior action filed by plaintiff, *Lois Sportswear, U.S.A., Inc.* v. *United States*, Court No. 82-12-01715, is granted on the ground that the Court lacks jurisdiction in that action;

2. That defendant together with its officers, agents and employees of the United States Customs Service shall be and hereby are enjoined, pending the resolution of this case on the merits, from issuing or enforcing notices of redelivery, seizing, or excluding plaintiff's merchandise from entry, predicated upon the June 30, 1982 ruling of the United States Customs Service;

3. That the Customs Service shall release forthwith to plaintiff any of plaintiff's merchandise which has been seized or redelivered pursuant to Customs' June 30, 1982 ruling, and which is now in Custom's custody;

4. That further proceedings in this section shall be stayed pending the final determination of the declaratory judgment action now pending in the United States District Court for the Southern District of New York, entitled *Lois Sportswear, U.S.A., Inc.* v. *Levi Strauss & Co.,* 82 Civ. 8326;

5. That within ten days of the entry of this order, plaintiff shall give and file security in the amount of $25,000.00 (an amount agreed to by the parties and approved by this Court) to indemnily defendant for any costs or damages as may be incurred or suffered by defendant should it ultimately be determined that defendant was wrongfully enjoined or restrained by the preliminary injunction granted by this order.[1]

(Slip Op. 83-48)

ROHM AND HAAS COMPANY, PLAINTIFF *v.* UNITED STATES, DEFENDANT, ALMAC PLASTICS, INC., PARTY-IN-INTEREST

Court No. 80-9-01342

Plastics—Acrylic Sheets—Clear and Colored

CONSTITUTION—SEPARATION OF POWERS

It is a longstanding and well-established precedent that the courts have no power to legislate *Louisville & Nashville R. R. Co.* v. *Mottley,* 219 U.S. 467 (1911). Courts do not sit to revise legislative action or determine the wisdom of statutes. *National Mutual Insurance Co.* v. *Tidewater Transfer Co.,* 337 U.S. 582 (1949). It is beyond the sphere of judicial authority to alter, modify, or change a law enacted by Congress even though it appears that the law is incorrect. *Dakota Central Telephone Co.* v. *South Dakota,* 250 U.S. 163 (1919). When Congress has spoken it is the function of the courts to interpret and not to legislate nor to pass upon the economic wisdom of Congress. *Federal Trade Comm.* v. *Simplicity Pattern Co.,* 360 U.S. (1959).

[1] This order was entered expeditiously due to the exigencies of the case and no further reflection by the Court was required. In due course, this order will be supplemented by a detailed memorandum.

COMMERCIAL DESIGNATION

In order to establish a commercial designation of a tariff term the burden falls upon the party seeking to establish the commercial designation to demonstrate that such tariff term has a meaning which is general (extending over the entire country), definite (certain of understanding), and uniform (the same everywhere in the country). *S. G. B. Steel Scaffolding & Shoring Co.* v. *United States,* 82 Cust. Ct. 197, C.D. 4802 (1979). It is a well-established rule that "before the plain understanding of a term can be deviated from it must be shown by plenary proof to have different impart in trade and commerce." *United States* v. *Wells, Fargo & Co.,* 1 Ct. Cust. Appls. 158, 161, T.D. 31211 (1911); *Excelsior Import Associates* v. *United States,* 66 CCPA 1, C.A.D. 1212, 583 F. 2d 513 (1978).

LEGISLATIVE RATIFICATION OF A JUDICIAL CONSTRUCTION

Under this doctrine, the courts have given *controlling effect* to the fact that the legislature is presumed to have approved of the judicial construction of a tariff provision when the provision is reenacted in the same or substantially the same language. *United States* v. *Astra Trading Corp.,* 44 CCPA 8, C.A.D. 627 (1956). This is especially true where the legislature has had both actual and constructive knowledge of the judicial construction. *United States* v. *Loffredo Bros.,* 46 CCPA 63 C.A.D. 679 (1958).

The imported merchandise, sheets of acrylic resin (imported under the trademark "Plexiglas") was entered at the Port of New York and classified under TSUS item A771.41 as flexible plastic sheets. The imported merchandise was granted duty free entry under the Generalized System of Preferences as products from Taiwan. Plaintiff, an American manufacturer, contends that the imported merchandise is not flexible according to trade usage but is "rigid" in nature and therefore is properly classifiable under TSUS item A771.45 as Other, of acrylic resin, dutiable at 8.5% per lb.

HELD

Customs properly classified the merchandise as flexible plastic sheet under TSUS item A771.41.

Plaintiff has failed to overcome the presumption that tariff terms are interpreted in their common meaning unless there is a manifest legislative intent to hold otherwise. Congress was advised both actually and constructively of Customs' desire to incorporate a test of flexibility based on scientific principles but chose not to amend the existing law. Plaintiff does not make a specific showing of a commercial designation by plenary proof nor does it demonstrate that Congress had a manifest intention to define the term flexible in a commercially designated way which differs from that term's common meaning.

[Judgment for defendant.]

(Decided: May 12, 1983)

Baker & McKenzie (William D. Outman, II at the trial and on the brief) for the plaintiff.

J. Paul McGrath, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Madeline B. Kuflik* at the trial and on the brief) for the defendant.

Almac Plastics, Inc. by *Jerome Goldner, pro se.*

LANDIS, *Judge:* Plaintiff commences this action as an American manufacturer pursuant to 19 U.S.C. § 1516. The subject imported merchandise, sheets of acrylic resin (imported under the trademark "Plexiglas") was entered at the port of New York in May, 1980, by Almac Plastics, Inc., the party-in-interest to this lawsuit.

The imported merchandise was classified pursuant to TSUS item A771.41 as flexible plastic sheets and was granted duty free entry under the Generalized System of Preferences as products from Taiwan. Plaintiff claims that the imported merchandise is properly classifiable as "other sheets of acrylic resin" pursuant to TSUS item 771.45, at a duty rate of $.085 per pound.

The relevant statutes are as follows:

Tariff Schedules of the United States

Schedule 7.—Specified Products; Part 12.—Rubber and Plastics Products, Subpart B.—Rubber and Plastics Waste and Scrap; Rubber and Plastics Film, Strips, Plates, Slabs, Blocks, Filaments, Rods, Tubing and other Profile Shapes.

Films, strips, sheets, plates, slabs, blocks, filaments, rods, seamless tubing, and other profile shapes, all the foregoing wholly or almost wholly of rubber or plastics.

Not of cellulosic plastics materials:

Film, strip, and sheets, all the foregoing which are flexible:

Other:

Item A771.41	Of materials other than polyester, polyvinyl chloride, polyethylene, or polypropylene, over 0.006 inch in thickness not in rolls [2].	6% ad val.

x
x
x
Other

Item A771.45	Of acrylic resin	8.5% per lb.

During the course of the trial, plaintiff called five witnesses and defendant called one witness. Additionally, the court granted a representative and officer of Almac Plastics, Inc. the opportunity to

participate at the trial.[1] The court received and entered fifteen (15) exhibits submitted by plaintiff and one (1) joint exhibit submitted pursuant to agreement of the litigants.

Plaintiff filed a trial brief and defendant filed a responsive trial brief. Plaintiff, although entitled, did not file a reply brief to defendant's responsive brief.

Plaintiff's initial witness, Walter G. Lee, was at the time of trial and importation of the merchandise in issue, Product Manager for Sheet Products for plaintiff Rohm & Haas Company (RHC). His unrefuted testimony indicates that he has been employed by plaintiff for over thirty (30) years and that plaintiff (RHC) is the premier United States sales company in the acrylic sheet industry. Identifying Exhibit 11 (a price list for manufacturing and sales by RHC, effective August 3, 1981), Mr. Lee stated that RHC has never marketed acrylic sheet in any size, thickness or dimension listed in Exhibit 11 as flexible plastic sheet. (R. 30–31)

Further testimony by Mr. Lee indicates that plaintiff's Exhibit I is comparable to the imported merchandise at issue, and, that plaintiff has never marketed such acrylic sheets as "flexible plastic sheets", but has marketed the product in issue as "a rigid plastic sheet" (R. 29–30). Mr. Lee testified that acrylic sheet is a transparent, rigid material with a high resistance to breakage and weather and can be substituted for glass in replacement window glazing. Mr. Lee also testified that since 1963 he has never encountered an acrylic sheet that has been sold or offered for sale in the United States as "flexible plastic sheets."

Mr. Lee also stated that the "Plexiglas" material in issue is shipped pursuant to documents referring to it as a rigid material in order to comply with pertinent Interstate Commerce Commission regulations. The witness offered no testimony as to a standard industry or commercial meaning of the term "flexible".

Plaintiff's subsequent witness was Mr. Frank W. Reinhart. This witness testified that he is currently a consultant in plastics and that he had previously been employed for twenty five (25) years by the National Bureau of Standards (NBS). Mr. Reinhart possessed excellent qualifications indicating a life-long career devoted to researching and evaluating plastic materials. The record indicates that Mr. Reinhart has been a member of the American Society of Testing Materials (ASTM) since 1945 and has received an honorary membership in ASTM, the highest bestowal award granted by that organization.

Mr. Reinhart was, at ASTM, chairman of a group developing definitions of terms for standards applicable to the plastics industry. He specifically stated that this group had difficulty developing a definition for the term "flexible", although the group perceived

[1] Mr. Jerome J. Goldner, Vice-President of Almac Plastics, Inc., the party-in-interest, entered a formal appearance after being fully advised of his legal rights to counsel by the court. Mr. Goldner acknowledged his awareness of the trial and did not request assistance of legal counsel (R. 108–109).

no problem defining terms such as "rigid", "semirigid" and "nonrigid". *The testimony definitively shows that members of Mr. Reinhart's committee continuously employed the term flexible during the discussion period but, that the committee could not agree upon a specific definition of the term "flexible" and thus, the committee never ratified a definition of the term "flexible".*

The record further indicates that in his attempt to develop a definition for "flexible" he examined every dictionary definition of "flexible" available, but found none of such terms examined satisfactory because the term had a trifold meaning in the plastics industry. Generally, he stated, that flexibility refers to three parameters: modulus of elasticity, dimension (emphasis on thickness), and intended use (R. 57–58). In general, this witness' opinion was of the fact that a plastic sheet with a modulus of elasticity of 100,000 psi and above is considered a rigid plastic sheet.

Mr. Reinhart identified Plaintiff's Exhibit 1 as "rigid" sheet and stated that he did not consider it "flexible" because its modulus of elasticity was too high. He also testified that a good test of "flexibility" is to fold a plastic sheet back on itself and crease it and, if it breaks, it is not "flexible".

Mr. Reinhart next identified Plaintiff's Exhibit 2 as a corrugated rigid building panel, similar according to the witness, with the subject merchandise in *Sekisui Products, Inc.* v. *United States,* 63 Cust. Ct. 123, C.D. 3885 (1969). He testified that this panel is not "flexible". Generally, the witness testified that if a plastic breaks, cracks or crazes when folded he does not consider it to be "flexible". Mr. Reinhart stated that he had read the entire transcript of the *Sekisui* case, *supra,* and that he disagrees with *Sekisui* witnesses that the meaning of the term "flexible" is synonymous with the common dictionary definition thereof.

As specific examples of "flexible" plastic sheet the witness identified plastics used in shower curtains, shoe uppers, furniture and imitation patent leather. Mr. Reinhart identified Plaintiff's Exhibit 8 as nine pages from a set of books entitled the *World Index of Plastics Standards,* published by the National Bureau of Standards in 1971 and stated that this publication does not use the term "flexible" to define, modify or describe acrylic sheet. However, during the colloquy leading to the admission of Exhibit 8 into evidence it was demonstrated and admitted that this publication was merely an index *listing* plastic standards and *not a compendium* of the standards themselves.

On cross-examination the witness testified that the ASTM Committee that developed technical definitions concerning plastics was composed of a balanced group which included manufacturers of plastic materials, users and university and government personnel. *He stated that the Committee could not reach an agreement on a definition of the term "flexible" and further, that there is no definition of the term "flexible" in ASTM Standard D 883 entitled*

"Standard Definitions of Materials Relating to Plastics" (Plaintiff's Exhibit 12).

The witness also testified that he could not recall any one definitive test method used throughout the plastics trade to determine the flexibility of plastics.

Plaintiff's subsequent witness was Mr. John P. Dellevigne, Vice President and General Manager of the Polyvinyl Chloride (PVC) Products Group for American Hoechst Corporation. He is responsible for the rigid PVC film and sheet portion of that firm's business.

He testified that the commercial meaning of the word "rigid" in the plastics industry is "unplasticized", meaning that the rigid material contains little or no plasticizer. He also testified that in trade terminology if an article is "rigid", it is not "flexible" and vice-versa.

Mr. Dellevigne further testified that he had read the stenographic minutes of the *Sekisui* case. He testified that Plaintiff's Exhibit 2 (corrugated plastic sheet) was a "rigid" sheet and not a "flexible" sheet. He stated that he did not agree with the statement of the *Sekisui* witness that the trade terminology of the term "flexible" is synonymous with the dictionary definition. He identified Plaintiff's Exhibit 2, merchandise similar to that in *Sekisui,* as "rigid" and not "flexible".

On cross-examination he stated that he is involved with PVC type plastics and that acrylic is a different plastic than PVC.

Plaintiff's next witness was Mr. Arthur H. Landrock, Subject Specialist of the Department of Defense Plastics Evaluation Center (Center). He testified that his activities at the Center are the generation, evaluation and exchange of technical information relating to plastics, from research through fabrication, with emphasis on properties and performance of plastic materials. He also helps to maintain a complete file of standards, specifications and handbooks on subject areas. Mr. Landrock is also chairman of Subcommittee D 20.91 on Editorial Review of ASTM Committee D 20 on Plastics where he is responsible for the editorial content of all standards going through the Committee.

The witness identified Plaintiff's Exhibit 1 as a "rigid" acrylic sheet and stated that such a sheet would not be classified as "flexible" in the plastics industry. He also identified Plaintiff's Exhibit 2 as a "rigid" corrugated sheet that is not "flexible." Mr. Landrock also testified that he would *not consider any plastic sheet* as "flexible."

The witness further testified that he disagreed with the testimony in the *Sekisui* case, *supra,* that the trade terminology and the dictionary definition of the term "flexible" is synonymous. He also testified that the term "flexible" as used in the preparation of a military or federal specification or standard would have the same meaning as the term used in the industry.

On cross-examination, plaintiff testified that the term "flexible" is not defined in the ASTM Standard D 883: "Standard Definitions of Terms Relating to Plastics" and that the reason for this was that there was a lack of uniformity within the industry for one definition of the term "flexible". Mr. Landrock also stated that the flexibility of an article depends not only upon the modulus of elasticity of that article but also upon its thickness and stiffness.

The final witness for plaintiff was Mr. Jelte Jansons, President of Read Plastics Company which wholesales the broadest range of plastic products in the Washington, D.C. metropolitan area. He stated that he has thirty three years of direct experience in marketing acrylic products. The witness testified that he markets acrylic sheet similar to Plaintiff's Exhibit 1. He stated that in trade terminology acrylic sheets are considered "rigid" material.

Mr. Jansons testified that the test he uses to determine whether a product is "flexible" is to crumple it, and if it comes back without being broken or creased he would call it "flexible". The witness also testified that he had read the transcript in the *Sekisui* case and disagreed with the witnesses' statement that the trade definition and the dictionary definition are synonymous.

In identifying Plaintiff's Exhibit 3 the witness stated that it was a rigid sheet of polyvinyl chloride despite the fact that he could twist, bend, and *flex* it. He also testified that his business services six states, all in the eastern United States and proximate to Washington, D.C.

Mr. Dominick Masiello, called as defendant's witness, has been a National Advisory Import Specialist since 1974 for the United States Customs Service. Mr. Masiello has been employed by Customs since 1954. His specialization is merchandise classifiable under TSUS item 771.41 and 771.45.

Mr. Masiello testified that he was present at the offices of Almac Plastics, Inc., where he witnessed certain tests on acrylic sheet similar in construction to Plaintiff's Exhibit 1. He observed that the acrylic sheet was laid flat on the ground with one side against a wall, that two men grabbed the other end and just walked it toward the wall and made the ends touch and then let go. (R. 187) The acrylic sheet did not break nor did it craze.

On cross-examination the witness was asked to perform one similar test on Plaintiff's Exhibit 1. He, with the assistance of plaintiff's counsel, attempted this test but did not complete it because there was fear that a dangerous situation existed. However, the court notes that the acrylic sheet did bend to a great degree without breaking or crazing.

In reviewing the extensive trial record including the exhibits admitted into evidence and all other papers submitted throughout the course of this case, the court holds for the defendant.

Initially, the court recognizes that plaintiff does not attack the common meaning of the term "flexible" but rather, argues that

there is a special trade terminology attendant with special tests that should control the classification of acrylic sheets. Plaintiff's witnesses testified to the existence of a trade or commercial meaning essentially attempting to establish a commercial designation despite a judicial holding and legislative intent to the contrary. Plaintiff's witness, Mr. Landrock, however, admitted on cross-examination that there was no uniformity in his committee regarding a definition of the term "flexible."

It is also a well-established principle in Customs jurisprudence that Tariff terms are to be construed in accordance with their common and commercial meanings, which are presumed to be the same. *United States* v. *C. J. Tower & Sons,* 48 CCPA 87, C.A.D. 770 (1961). Congress is presumed to know the language of commerce, and to have framed tariff acts so as to classify commodities according to the general usage and denomination of trade. *Nylos Trading Co.,* v. *United States,* 37 CCPA 71, C.A.D. 422 (1942). In the interpretation of the tariff laws, words should be construed in their commonly received meaning and popular sense, in the absence of contrary legislative intent or proof of a commercial designation. *Ozen Sound Devices* v. *United States,* 67 CCPA 67, C.A.D. 1246, 620 F. 2d 880 (1980); *United States* v. *Corning Glass Works,* 66 CCPA 25, C.A.D. 1216, 586 F. 2d 882 (1978). Tariff acts are not drafted in terms of science, but in terms of commerce, which is *presumptively* that in common use, and, in the absence of a contrary legislative intent, tariff terms are not to be construed according to their scientific meaning, where that meaning differs from the common or commercial meaning. *United States* v. *Sandoz Chemical Works, Inc.,* 46 CCPA 115, C.A.D. 711 (1959).

In view of the foregoing, plaintiff, to succeed in this action, must demonstrate that there is a legislative intent contrary to the presumption of interpretation under common meaning or prove that there exists a definite, uniform and general commercial designation resulting from established usage in commerce and trade. *Maddock* v. *Magone,* 152 U.S. 368 (1894), that is not contrary to a manifest legislative intent.

The acrylic sheets in issue were classified pursuant to TSUS item A771.41. The presumption is, therefore, that they are flexible sheets according to the superior headnote. There is no use of the term "rigid" nor any specific definition of the term "flexible". Absent such definition, the presumption is that "flexible" is to be used and interpreted by its common meaning. *United States* v. *C. J. Tower & Sons, supra.* In *Sekisui Products, Inc.* v. *United States, supra,* the Customs Court stated that the merchandise there in issue (similar to Plaintiff's Exhibit 2 in the instant action) was properly classifiable as "other flexible plastic sheets". The court further found that the common meaning of the term "flexible" was definitively stated in *Webster's Third New International Dictionary of the English Language,* Unabridged (1961) as:

> 1. capable of being flexed: capable of being turned, bowed, or twisted without breaking. * * * Syn. Elastic, resilient, springy, supple: Flexible is applicable to anything capable of being bent, turned, or twisted without being broken and with or without returning of itself to its former shape.

This common meaning definition of the term "flexible" has not been altered since *Sekisui* and is applicable to the definition of "flexible" as used in this action.

Equally important is the fact that Congress has chosen not to amend the law to define "flexible" in a commercial designation even though made specifically aware of the *Sekisui* decision and its ramifications. In a letter dated July 13, 1977, Mr. G. R. Dickerson, the then Acting Commissioner of Customs, apprised Congressman Charles A. Vanik, Chairman, Subcommittee on Trade, Committee on Ways and Means, of the broad nature of the flexibility test under *Sekisui* and, his desire for a quantitative test based on the modulus of elasticity in flexure which would be easier to administer.[2] Congress subsequently modified Schedule 7, Part 12, Subpart B, when it amended the language of Headnote 2 (iv)(D) thereunder.[3] However Congress although fully apprised of Customs request for a commercial designation based on a quantitative test of the term "flexibility" chose to leave it in its present state.

It is evident that Congress had both actual and constructive notice of the *Sekisui* decision prior to the 1977 changes in Schedule 7, Part 12, Subpart B. Thus, there exists here a classic example of legislative ratification of a judicial construction. Under this doctrine, the courts have given *controlling effect* to the fact that the legislature is presumed to have approved of the judicial construction of a tariff provision when the provision is reenacted in the same or substantially the same language. *United States* v. *Astra Trading Corp.*, 44 CCPA 8, C.A.D. 627 (1956). This is especially true where the legislature has had both actual and constructive knowledge of the judicial construction. *United States* v. *Loffredo Bros.*, 46 CCPA 63, C.A.D. 697 (1958).

In sum, it is apparent that Congress did not intend to define the term "flexible" in a commercially designated sense or, in any manner attempt to change its common meaning despite the fact that Congress was fully informed of the ramifications of the *Sekisui* case.

Plaintiff has also failed to prove that the term "flexible" has a commercial designation based on a trade understanding of the term "flexible" which differs from its common meaning and is not in conflict with clearly manifested legislative intent.

In order to establish a commercial designation of a tariff term the burden falls upon the party seeking to establish the commer-

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[2] A verbatim typewritten copy of this letter is attached as Appendix I to this decision.

[3] This amendment provided that film, strips and sheets had to be *usefully* processed rather than *merely* processed to be classified under Subpart B. Pub. L. 95–160, § 3, 91 Stat. 1271 (Nov. 8, 1977).

cial designation to demonstrate that such tariff term has a meaning which is general (extending over the entire country), definite (certain of understanding), and uniform (the same everywhere in the country). *S. G. B. Steel Scaffolding & Shoring Co.* v. *United States,* 82 Cust. Ct. 197, C.D. 4802 (1979). It is a well-established rule that "before the plain understanding of a term can be deviated from it must be shown by plenary proof to have a different import in trade and commerce." *United States* v. *Wells, Fargo & Co.,* 1 Ct. Cust. Appls. 158, 161, T.D. 31211 (1911); *Excelsior Import Associates* v. *The United States,* 66 CCPA 1, C.A.D. 1212, 583 F.2d 513 (1978). The rule was intended to apply to cases where the trade designation was so universal and so well understood that *Congress, and the trade,* were supposed to have been fully acquainted with the practice at the time the law was enacted. *Jas. Akeroyd & Co.* v. *United States,* 15 Ct. Cust. Appls. 440, T.D. 42641 (1928).

In reviewing the trial testimony the court finds that two key witnesses for plaintiff, Messrs. Reinhart and Landrock, testified that they held prominent positions in the American Society of Testing Materials (ASTM). Mr. Reinhart was chairman of a group developing definitions of terms for standards applicable to the plastics industry, and Mr. Landrock was chairman of a subcommittee of ASTM on Editorial Review where he was responsible for the editorial content of all standards going through ASTM Committee D 20 on Plastics. Both witnesses uncategorically testified that ASTM has never developed or published a definition of the term "flexible". Further, both state that the reason for the lack of a standard definition of the term "flexible" is that the ASTM Committee, despite continuous discussion, *could not agree* upon a specific definition of that term and that there *was a lack of uniformity within the industry for a singular definition thereof.*

There is also a dichotomy as to the testing methods to be employed in determining whether acrylic sheet is "flexible". Messrs. Reinhart and Landrock indicate a scientific approach while plaintiff's witness Mr. Jansons, a wholesaler of plastic products in approximately six states regionally, merely indicated that his test was to "crumple" the plastic material and, if it did not break or crease, it was "flexible". A commercial designation is not established where there is a conflict in the testimony of trade witnesses as to the commercial meaning of a term. *S. G. B. Steel Scaffolding & Shoring Co.* v. *United States, supra.*

Plaintiff's witnesses speak in terms of "rigid" as applied to plastic sheets. Interestingly, Congress does not employ this term in the applicable TSUS items although they could have readily done so.

Since there appears to be a lack of uniformity among plastics experts nationwide (indeed, ASTM a leader on developing definitions could not agree upon a definition for "flexible") and conflict as to actual testing methods, scientific versus a "hand" approach, plain-

tiff has failed to demonstrate a general, uniform and definite definition of a commercial designation for acrylic sheet.

Equally important is the fact that plaintiff has not demonstrated that the legislative intent clearly does not lie in the common meaning of the term "flexible". To prove a commercial designation plaintiff must not only show the trade usage itself but must overcome the intention of Congress where that intention is clearly manifest. *Cadwalader* v. *Zeh,* 151 U.S. 171 (1894); *Florsheim Shoe Co., Division of Interco, Inc.* v. *United States,* 71 Cust. Ct. 187, C.D. 4495 (1973).

In conclusion, plaintiff has failed to demonstrate a contrary legislative intent other than the common meaning of the term "flexible". Plaintiff has also failed to show through plenary proof a definite, general and uniform commercial designation.

What plaintiff attempts to accomplish is to have this court change the clear meaning of a legislative enactment. It is a long-standing and well-established precedent that the courts have no power to legislate. *Louisville & Nashville R. R. Co.* v. *Mottley,* 219 U.S. 467 (1911). Courts do not sit to revise legislative action or determine the wisdom of statutes. *National Mutual Insurance Co.* v. *Tidewater Transfer Co.,* 337 U.S. 582 (1949). It is beyond the sphere of judicial authority to alter, modify, or change a law enacted by Congress even though it appears that the law is incorrect. *Dakota Central Telephone Co.* v. *South Dakota,* 250 U.S. 163 (1919). When Congress has spoken it is the function of the courts to interpret and not to legislate nor to pass upon the economic wisdom of Congress. *Federal Trade Comm.* v. *Simplicity Pattern Co.,* 360 U.S. 55 (1959).

Defendant, on the other hand, has persuasively demonstrated that Congress was fully apprised both constructively and actually of the test standards enunciated under the *Sekisui* case. In fact, the then acting Commissioner of Customs, *in response to an inquiry from a Member of Congress,* suggested that Congress adopt a test similar to the one plaintiff urges this court to adopt. That specific subpart of the law was modified but no change or modification occurred as to the term "flexible". This, of course, must speak for itself. If plaintiff desires a change in the current law it must go to the appropriate source, the legislative branch of government.

Accordingly, the classification of the District Director of Customs at the Port of New York is sustained, and the complaint of plaintiff is, in all respects, dismissed.

Judgment will enter accordingly.

APPENDIX 1

This correspondence reads as follows:

July 13, 1977.

THE HONORABLE CHARLES A. VANIK,

Chairman, Subcommittee on Trade,
Committee on Ways and Means,
House of Representatives,
Washington, D.C.

Dear Mr. Chairman: In a letter dated June 14, 1977, you requested that in order to clarify the dutiable status of acrylic sheets, we provide your committee with an explanation of our practice with respect to the term "flexibility" as it applies to acrylic sheets classifiable under item 771.42, Tariff Schedules of the United States (TSUS).

Our practice with respect to the determination of whether acrylic sheets are flexible so as to be within the purview of item 771.42, TSUS, is guided by the case of *Sekisui Products Inc.* v. *United States,* 63 Cust. Ct. 123, C.D. 3885 (1969). In that case the Government contended that the plaintiff had failed to prove that the corrugated plastic panels in issue were flexible. In response to that contention the court stated:

> As previously noted the imported panels can be bent into circular form along the corrugations, after which they return to their original shape. Likewise, the panels—with some difficulty—can be bent width-wise against corrugations until both ends join. When released after such bending, the panels will again reassume their original shape, but show evidence of creasing. These characteristics clearly place the imported panels within the accepted definition of the word "flexible." The fact that it is more difficult to bend the importations against the corrugations scarcely detracts from the fact that they are flexible. There is certainly no requirement that for an article to be flexible it must be capable of being bent, bowed or twisted in every direction. A bow, for instance, used for archery purposes is obviously flexible—that being the very purpose of its construction. Yet it would be practically impossible to flex or bend it in more than one direction. Indeed, even copper tubing has been held to be flexible. *Hansel* v. *United States,* 2 Cust. Ct. Appls. 221, T.D. 31951 (1911). A fortiori, the imported panels here are manifestly flexible. Examination of the samples, without more, makes this apparent. For such examination shows that they are "springy," "elastic," "resilient" and "supple"—which are the synonyms for the term "flexible," given in the dictionary definition.

The court's test is exceptionally broad and has caused some administrative difficulty. Further, it appears that as a result of the court's decision some merchandise is being treated as flexible for tariff purposes which was not so regarded by the framers of the tariff schedules.

A quantitative test, based on the modulus of elasticity in flexure would be easier to administer and lead to more consistent results.

We would be happy to discuss this matter further at your convenience.

Sincerely yours,

(SIGNED) G. R. DICKERSON,
Acting Commissioner of Customs.

(Slip Op. 83-49)

CARLISLE TIRE AND RUBBER COMPANY, PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Court No. 79-5-00748

Before MALETZ, *Senior Judge.*

On Plaintiff's Supplementary Motion and Defendant's Supplementary Cross-Motion for Summary Judgment

(Dated May 18, 1983)

Eugene L. Stewart and *Terence P. Stewart* for the plaintiff.
J. Paul McGrath, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch (*Sheila N. Ziff* on the brief), for the defendant.

MALETZ, *Senior Judge:* This case is one of first impression, posing the question whether a generally available tax deduction for accelerated depreciation of equipment is a bounty or grant within the meaning of section 303 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1303 (1976).[1] Plaintiff Carlisle Tire and Rubber Company (Carlisle), a domestic manufacturer of bicycle tires and tubes, challenges the countervailing duty redetermination of the International Trade Administration of the Department of Commerce (ITA) involving bicycle tires and tubes imported from the Republic of Korea. That redetermination was made pursuant to the remand of this court in *Carlisle Tire & Rubber Co.* v. *United States,* 2 CIT 97 (1981).

In its initial review of this matter this court found that the administrative record did not "contain sufficient information to enable the court to determine or reasonably estimate the amount of benefits received by the Korean importers, * * *" *Id.* at 102. However, in lieu of undertaking *de novo* judicial review—which was available prior to enactment of the Trade Agreements Act of 1979—the court instead remanded the matter to the ITA for a redetermination. *Id. See Carlisle Tire & Rubber Co.* v. *United States,* 1 CIT 352, 357-58, 517 F. Supp. 704, 708-09 (1981).

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[1] The redetermination which is the focus of this action was rendered under section 303 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1303 (1976), the law in effect prior to the Trade Agreements Act of 1979. That section provided in part:

> Whenever any country * * * shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, * * * then upon the importation of such article or merchandise into the United States, * * * there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

On March 3, 1982, the ITA submitted its redetermination in which Carlisle concurred save for three of the ITA's findings: (1) that Hung-A Industrial Co., Ltd (Hung-A), a Korean manufacturer of bicycle tires and tubes, did not receive countervailable benefits under Article 51-1-1 of the Korean Corporation Tax Law, a provision permitting accelerated depreciation of equipment; (2) that Hung-A did not receive a bounty or grant under Article 51-1-4 of that same Tax Law which gives additional accelerated depreciation to those enterprises which maintain accurate business records; and (3) that the benefits received by Hung-A under two export-related reserve fund programs, while undisputably countervailable, were properly calculated by using Hung-A's opening balance for 1977. It is these programs which are the focus of Carlisle's supplementary motion and the ITA's supplementary cross-motion for summary judgment.

For the reasons that follow, the court concludes that the two accelerated depreciation programs under Articles 51-1-1 and -4 are not a bounty or grant within the meaning of section 303 of the Tariff Act of 1930 inasmuch as the benefits accorded under these programs are not preferential but rather are generally available to the entire business community of Korea. With regard to the export reserve fund programs, the present record before the court lacks a sufficient factual foundation as to Hung-A's tax payment and accounting practices. Thus, the court is unable to ascertain whether the ITA's calculations were properly determined and, hence, neither party is entitled to judgment as a matter of law. *See* rule 56(d) of the rules of this court.[2] Accordingly, Carlisle's supplementary motion for summary judgment is denied, and the ITA's cross-motion for summary judgment is granted in part and denied in part.

I

The court turns first to an examination of the accelerated depreciation available under Articles 51-1-1 and -4 of the Korean Corporation Tax Law. Under Article 51-1-1 machinery or equipment used directly for manufacturing may be depreciated by an additional 20% beyond that ordinarily allowed under Korean law, provided the machinery or equipment is used at least 12 hours daily.[3] The tax benefit program under Article 51-1-4 likewise permits so-called

[2] Since this action is a *de novo* proceeding, *see Carlisle Tire & Rubber Co.* v. *United States*, 1 CIT 352, 357-58, 517 F. Supp. 704, 708-09 (1981), the full panoply of discovery procedures is available. In view of this consideration, a second remand is not only unnecessary but would further delay an already extensively protracted action.

[3] Carlisle contends that in light of this 12-hour-per-day requirement the tax benefits under Article 51-1-1 are not generally available. This argument proves too much, however, for every tax benefit necessarily provides for minimum conditions which must be met before a taxpayer can qualify for it. This fact alone cannot mean that the benefits available under a tax provision are not generally available. Nor is the 12-hour-per-day requirement so conditional that it makes Article 51-1-1 a preferential benefit.

"green returns" corporations to take an additional 20% depreciation beyond that normally allowed. (Green is the color of the tax return form.) Enterprises may take advantage of the "green return" program if they have had a history of maintaining accurate business records,[4] including the filing of accurate tax returns.

In its redetermination the ITA found that Hung-A had availed itself of the benefits under Articles 51-1-1 and -4. However, the ITA concluded that "[s]ince the programs under Article 51-1-1 and 51-1-4 are available to all manufacturers they are not preferential and are not bounties or grants." Thus, in the view of the ITA, a condition precedent to finding that a domestic program provides a bounty or grant is that the program give an advantage to one or more industries vis-a-vis other industries within the same country.

Carlisle is of the diametrically opposite view. It argues that benefits from government programs are countervailable even if they are generally available on a nonpreferential basis. It bases this contention on what it considers to be a plain reading of the words "bounty or grant" contained in section 303, concluding that Congress intended to cast its net broadly in order to catch all subsidies, export as well as domestic, without restriction. According to Carlisle, Congress expressed in unequivocal words its direction that *all* bounties or grants on manufacture or production be offset by means of countervailing duties in the amount of the net bounty or grant.

For its part the ITA counters that no generally available domestic program has ever been countervailed as a section 303 bounty or grant. Given this situation, the ITA concludes, there exists a longstanding administrative practice which should not be disturbed, citing *Zenith Radio Corp.* v. *United States,* 437 U.S. 443 (1978).

II

While it is true that no generally available domestic subsidy has ever been countervailed, this glosses over the fact that this issue has never been directly considered either administratively or judicially.[5] The lack of opportunity to address the question whether a generally available domestic program is a section 303 bounty or grant is hardly synonymous with a longstanding and consistent administrative practice. Notwithstanding the absence of such a longstanding practice, the court nevertheless agrees that generally available domestic tax benefits are not bounties or grants within the meaning of section 303 for at least three reasons: the deference

[4] Carlisle argues that the "green returns" benefit of Article 51-1-4 is not generally available because, in the words of the translated text of that law, "[t]he Greens Returns Corporations shall be treated differently in comparison with normal corporations." However, this statement is nothing more than a truism, since any business which satisfies the conditions for taking a tax deduction is *ipso facto* differently circumstanced from businesses which do not. This fact does not derogate from the general availability of the deduction. *See* note 3, *supra.*

[5] The ITA has cited one instance where a generally available domestic program was not countervailed, *Countervailing Duty Investigations on Certain Steel Mill Products from Belgium,* 47 Fed. Reg. 39304 (Sept. 7, 1982). However, that case was decided under the Trade Agreements Act of 1979 and then some six months after the redetermination in the instant case.

due an agency's interpretation of the statute it is charged with administering, the absurd consequences which would flow from adoption of Carlisle's interpretation of section 303, and recent congressional pronouncements which show that section 303 was not intended to reach generally available domestic subsidies.

A

First, in connection with the interpretation given a statute by the agency charged with its administration, it is basic that a court should defer to such interpretation, provided it is reasonable. *See, e.g., Zenith Radio Corp.* v. *United States,* 437 U.S. at 450; *Train* v. *Natural Resources Defense Council,* 421 U.S. 60, 75 (1975); *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965). In addressing the question of reasonableness the court notes that nowhere in the legislative history of section 303 is there a definition of "bounty or grant". From this it has been inferred that Congress consciously refrained from spelling out the precise criteria for determining what constitutes a bounty or grant, but rather intended that the metes and bounds of that term be staked out judicially and through administrative practice. *United States* v. *Zenith Radio Corp.,* 64 CCPA 130, 140 & n.14, C.A.D. 1195, 562 F.2d 1209, 1217 & n.14, (1977), *aff'd,* 437 U.S. 443 (1978). In the case of domestic subsidies the ITA has here interpreted "bounty or grant" as connoting some special or comparative advantage conferred upon an industry or group of industries and not available to all manufacturers and producers within a given country. Absent an industry-specific or regional preference, the ITA contends, there can be no bounty or grant as that term is used in section 303.

The court agrees with the ITA's interpretation of section 303. Support for this position can be found, first of all, in the case law where a bounty or grant has been defined as a "special advantage," *Nicholas & Co.* v. *United States,* 7, Ct. Cust. App. 97, 107 (1916), *aff'd* 249 U.S. 34 (1919), "an additional benefit" or "valuable privilege" conferred upon a "class of persons". *Downs* v. *United States,* 113 F. 114, 147 (4th Cir. 1902), *aff'd,* 187 U.S. 496 (1903). Secondly, lexicons have defined a "bounty" as "[a] grant or subsidy to encourage an industry", and "grant" as a "tract of land, a monopoly, or the like, granted by the government"—both suggesting preferential treatment. Webster's New Int'l Dictionary 317, 1089 (2d ed. 1956).

Furthermore, although no decision of this court has directly passed on this specific question, several cases suggest that at a minimum either a regional or industry preference be present in order for a bounty or grant to exist. *See, e.g., ASG Industries, Inc.* v. *United States,* 67 CCPA 11, C.A.D. 1237, 610 F.2d 770 (1979); *ASG Industries, Inc.* v. *United States,* 67 CCPA 31, C.A.D. 1238 (1979); *ASG Industries Inc.* v. *United States,* 82 Cust. Ct. 101, C.D. 4794, 467

F. Supp. 1200 (1979); *Michelin Tire Corp.* v. *United States,* 2, CIT 143 (1981); *Macalloy Corp.* v. *United States,* 1 CIT 199 (1981).[6] All in all, the court must conclude that the ITA's interpretation here is reasonable.

B

What is more, adoption of Carlisle's literal view that generally available benefits are a bounty or grant would, if taken to its logical extreme, lead to an absurd result. Thus, included in Carlisle's category of countervailable benefits would be such things as public highways and bridges, as well as a tax credit for expenditures on capital investment even if available to all industries and sectors. As observed by one commentator in the context of general domestic subsidies.

> These [types of generally available] subsidies have such a widespread effect on production that countervailing duties, were they allowed in such cases, could be imposed on almost every product which enters international commerce. Moreover, measurement of the exact extent of the net subsidy falling on any given product line would be unusually difficult. In any given case the amount of offsetting duty levied could be quite arbitrary.

Barcelo, *Subsidies and Countervailing Duties—Analysis and a Proposal,* 9 L. & Pol'y in Int'l Bus. 779, 836 (1977) (footnote omitted). To suggest, as Carlisle implicitly does here, that almost every import entering the stream of American commerce be countervailed simply defies reason. Moreover, in such a circumstance the burden that would be placed on the administering authority would be overwhelming, representing far more than mere administrative inconvenience.

Also, there would be the well-nigh insurmountable problem of arbitrary administration of the countervailing duty laws which would result from adoption of Carlisle's literal reading. For example, how could the benefit to industry in general accruing from construction of a public highway be fairly calculated? What would be the dollar value to the private sector of governmental research and development programs? Not only would accurate calculation of such benefits be difficult in the extreme, doing so in a reasoned and even-handed manner would be next to impossible.

If a literal reading of a statute leads to an absurd conclusion, it is to be rejected. *United States* v. *Bryan,* 339 U.S. 323, 338 (1950); *Asahi Chemical Industry Co.* v. *United States,* 4 CIT —, 548 F. Supp. 1261 (1982). "No rule of construction necessitates * * * acceptance of an interpretation resulting in patently absurd consequences." *United States* v. *Brown,* 333 U.S. 18, 27 (1948). And taken to its logical extreme, Carlisle's interpretation of the term "bounty or grant" would lead to just that.

[6] A regional development program is by its very nature preferential rather than general in scope since it favors that class or group of enterprises doing business within the region over those enterprises situated outside of it.

While Carlisle's position might have had some appeal in the early days of the countervailing duty law—a time when laissez faire was the guiding economic principle of government—its argument fails to appreciate modern day realities. In the wake of the Great Depression government after government in the West relegated Adam Smith and his "invisible hand" to the history books in favor of Keynesian and other interventionist economic policies. The pure market economy is today a mere theoretical model. It is safe to say that there is now no government professing to adhere to the private-enterprise system which does not to an ever increasing extent insinuate itself into the macroeconomics of a country. *See* M. & R. Friedman, Free to Choose 1–2, 70–71 (1980). *See generally* 6 Encyclopaedia Britannica 275–77 (15th ed. 1982).

Given these considerations the court must perforce reject Carlisle's interpretation which would equate a generally available benefit with a bounty or grant.

C

Having concluded that the term "bounty or grant" does not include generally available benefits, the court turns finally to a consideration of the Trade Agreements Act of 1979 for the additional light it sheds on this question. In enacting the Trade Agreements Act of 1979 Congress specifically provided that the new statutory term "subsidy" has the same meaning as the term "bounty or grant" found in section 303. Section 771(5) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677(5) (Supp. IV 1980). *See also* S. Rep. No. 249, 96th Cong., 1st Sess. 84 (1979) ("The definition of 'subsidy' is intended to clarify that the term has the same meaning which administrative practice and the courts have ascribed to the term 'bounty or grant' under section 303 of the Tariff Act of 1930, * * *"). Significantly, section 771(5) lists several examples of domestic subsidies which are countervailable, but conditions these examples with the proviso that they be furnished *"to a specific enterprise or industry, or group of enterprises or industries."* 19 U.S.C. § 1677(5)(B) (italic added).

It is true that the views of a subsequent Congress cannot override the unmistakable intent of the enacting one, *Teamsters* v. *United States,* 431 U.S. 324, 354 & n.39 (1977)), and form a hazardous basis for inferring the intent of an earlier one, *United States* v. *Price,* 361 U.S. 304, 313 (1960). Nevertheless, such views are entitled to some weight, particularly when the precise intent of the enacting Congress is obscure. *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.,* 444 U.S. 572, 596 (1980). Here Congress' intent in the Trade Agreements Act of 1979 to limit a "bounty or grant" to those subsidies which are preferential in nature underscores the court's earlier conclusion that generally available benefits are not a section 303 bounty or grant.

III

For all the foregoing reasons, Carlisle's supplementary motion for summary judgment is denied, and the ITA's supplementary cross-motion for summary judgment is granted in part and denied in part.

HERBERT N. MALETZ, *Senior Judge.*

Decisions of the United States Court of International Trade

Abstracts

Abstracted Protest Decisions

DEPARTMENT OF THE TREASURY, *April 7, 1983.*

The following abstracts of decisions of the United States Court of International Trade at New York are published for the information and guidance of officers of the Customs and others concerned. Although the decisions are not of sufficient general interest to print in full, the summary here given will be of assistance to Customs officials in easily locating cases and tracing important facts.

WILLIAM VON RAAB,
Commissioner of Customs.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
P83/139	Ford, J. May 17, 1983	Arriflex Corp. d/o Berkey Photo Corp.	80-7-0-108	Item 722.80 Various rates (merchandise marked "A" or "B")	Item 722.32 7.5% (merchandise marked "A") Item 722.04 6% (merchandise marked "B")	Agreed statement of facts	New York Arriflex film magazines
P83/140	Ford, J. May 17, 1983	John Wind Imports	80-10-01731, etc.	Item 389.62 25¢ per lb. + 15% Item 386.09 25%	Item 706.24 20%	J.E. Mamiye & Sons v. U.S. (C.D. 4878)	Chicago Tote bags
P83/141	Boe, J. May 17, 1983	APF Electronics Inc.	81-11-01553	Merchandise separately classified under items 720.02, 720.14, etc. and assessed with duty at various rates	Item 676.20 4.8% or 4.7% (merchandise marked "A") Item A676.20 Free of duty pursuant to TSUS General Headnote 3(c) (merchandise marked "B")	Texas Instruments, Inc. v. U.S. (CIT 4/17/81), aff'd 3/25/82	New York Solid state timing devices; entirety with article in which incorporated

P83/142	Boe, J. May 17, 1983	Sounddesign Corp. Div. of BPM	82-6-00832	Merchandise separately classified under items 720.02, 716.18, etc. and assessed with duty at various rates	Item 685.24 9.3% (merchandise marked "A") Item A685.24 Free of duty pursuant to TSUS General Headnote 3(c) (merchandise marked "B") Item 685.50 6.9% (merchandise marked "C")	Texas Instruments, Inc. v. U.S. (CIT 4/17/81), aff'd 3/25/82	New York Solid state timing devices; entirety with article in which incorporated

Decisions of the United States Court of International Trade

Abstracts

Abstracted Reappraisement Decisions

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R83/408	Watson, J. May 12, 1983	A & A International Corp.	R59/10623, etc.	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Boston Transistor radios, accessories and parts; entireties
R83/409	Watson, J. May 12, 1983 [substituted for decision and judgment entered on 2/9/83, Abs. R83/177]	Imperial International Corp.	R62/4530, etc.	Export value	Appraised values, less 7.5%, net packed	Agreed statement of facts	New York Transistor radios, accessories and parts; entireties
R83/410	Watson, J. May 12, 1983	W.R. Zanes & Company, et al. (Trans-Ocean Import Co., Inc.)	R60/5829, etc.	Export value	Appraised values less 7.5% thereof	Agreed statement of facts	Houston Wool rugs

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R83/411	Re, C.J. May 17, 1983	Koniphoto Corporation	78-10-01836	Export value	Appraised unit values specified on entry papers by appraising customs officer, less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Not stated
R83/412	Re, C.J. May 17, 1983	Marubeni America Corp.	74-7-01855	United States value	Equal to appraised values, less 10%, or invoiced unit values, less all non-dutiable charges, whichever is higher	Agreed statement of facts	New York Fabrics, etc.
R83/413	Re, C.J. May 17, 1983	Marubeni America Corp.	77-9-02836	United States value	Appraised values, less additions made for currency fluctuation, and less 10%, or invoiced unit values, less non-dutiable charges, whichever is higher	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Fabrics
R83/414	Re, C.J. May 17, 1983	Mitsubishi Int'l. Corp.	76-10-02335	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Chicago Not stated
R83/415	Re, C.J. May 17, 1983	Toyota Motor Sales, Inc.	74-1-00079	Export value	Appraised values specified on entry papers by liquidating officer, less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	San Francisco Not stated
R83/416	Re, C.J. May 17, 1983	Toyota Motor Sales, U.S.A. Inc.	74-5-01378	Export value	Appraised values specified on entry papers by liquidating officer, less any additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	San Francisco Not stated

R83/417	Ford, J. May 17, 1983	Beer Precast Concrete, Ltd.	79-9-01403	Export value	Equal to $156.27/ton, net packed	Agreed statement of facts	Buffalo Prefabricated concrete construction materials
R83/418	Ford, J. May 17, 1983	J. C. Penney Purchasing Corporation	80-6-00882	American selling price	Listed in Column III of Schedule A attached to decision and judgment	Agreed statement of facts	Los Angeles Not stated
R83/419	Watson, J. May 18, 1983	A & A Trading Corp.	R61/14238, etc.	Export value (entries listed in Schedules A and B)	Appraised unit values less 7.5% thereof, net packed (entries listed in Schedule A) Appraised values shown on entry papers less amounts attributable to buying commission (exporter's commission or purchasing agent's commission) (entries listed in Schedule B)	Agreed statement of facts	Boston All transistor radios (entries listed in Schedule A); all merchandise except transistor radios described on Schedule A, which had buying agent's commissions included as part of appraised values
R83/420	Watson, J. May 18, 1983	Aircargo Brokerage Co., Tanross Supply Co.	R59/12939, etc.	Export value	F.o.b. unit invoice prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	Miami All binoculars and micron style binoculars
R83/421	Watson, J. May 18, 1983	Amerco Plastics Inc.	R65/23699, etc.	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	New York All television sets
R83/422	Watson, J. May 18, 1983	Iwai of New York Inc.	R62/593	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	New York Transistor radios, accessories and parts; entireties
R83/423	Watson, J. May 18, 1983	J. C. Penney Co.	R60/7729, etc.	Export value	F.o.b. unit prices plus 20% of difference between f.o.b. unit prices and appraised values	Agreed statement of facts	San Francisco Transistor radios, accessories and parts; entireties
R83/424	Watson, J. May 18, 1983	J. C. Penney Co.	R64/24083, etc.	Export value	Appraised unit values less 7.5% thereof, net packed	Agreed statement of facts	San Francisco Transistor radios, accessories and parts; entireties.

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